In the Supreme Court

OF THE

United States

OCTOBER TERM, 1979

No. 79-512

SCINDIA STEAM NAVIGATION CO., LTD.,
Petitioner,

vs.

LAURO DE LOS SANTOS and SEATTLE STEVEDORE CO.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI
to the
United States Court of Appeals
for the Ninth Circuit

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PETITION FOR A WRIT OF CERTIORARI
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Petitioner prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit, first entered in this case May 1, 1979, as to which rehearing was denied June 28, 1979.

OPINIONS BELOW

The order and opinion of Judge Walter T. McGovern, Chief Judge of the United States District Court for the Western District of Washington, are not officially reported[1] but are set forth in Appendix pages A-1 through A-6, *infra*. The initial opinion of the United States Court of Appeals for the Ninth Circuit is reported at 598 F.2d 480 and is set forth in Appendix pages B-1 through B-23, *infra*. The order of the Court of Appeals denying the petition for rehearing is not reported but is set forth in Appendix pages C-1 through C-3, *infra*.

JURISDICTION

On May 1, 1979, the Court of Appeals entered its judgment reversing the decision of the District Court granting the petitioner's summary judgment motion. A petition for rehearing was timely filed May 15, 1979, and was denied on June 28, 1979. The jurisdiction of this court is invoked under 28 U.S.C. section 1254(1).

QUESTION PRESENTED

The question presented is whether a shipowner is required to countermand a stevedore contractor's informed decision regarding the safety of work methods and equipment in order to avoid liability to longshoremen who are employees of the stevedore company under the negligence standard of the 1972 Amendments to the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. § 905(b).

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[1]They are reported at 1976 A.M.C. 2583.

STATUTE INVOLVED

Longshoremen's and Harbor Workers' Compensation Act, as amended in 1972, 33 U.S.C. § 905(b):

> In the event of injury to a person covered under this chapter caused by the negligence of a vessel, then such person, or anyone otherwise entitled to recover damages by reason thereof, may bring an action against such vessel as a third party in accordance with the provisions of section 933 of this title, and the employer shall not be liable to the vessel for such damages directly or indirectly and any agreements or warranties to the contrary shall be void. If such person was employed by the vessel to provide stevedoring services, no such action shall be permitted if the injury was caused by the negligence of persons engaged in providing stevedoring services to the vessel. If such person was employed by the vessel to provide ship building or repair services, no such action shall be permitted if the injury was caused by the negligence of persons engaged in providing ship building or repair services to the vessel. The liability of the vessel under this subsection shall not be based upon the warranty of seaworthiness or a breach thereof at the time the injury occurred. The remedy provided in this subsection shall be exclusive of all other remedies against the vessel except remedies available under this chapter.

STATEMENT OF THE CASE

Plaintiff is a longshoreman who filed this action within the diversity jurisdiction of the United States District Court for the Western District of Washington to recover damages, in addition to his workers' compensation benefits, for injuries he sustained aboard petitioner's ship just after the effective date of the 1972 Amendments to the

Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. § 905(b).

For two days, plaintiff and other longshoremen, all employees of Seattle Stevedore Company, had worked with a winch whose brake continually malfunctioned (Appendix, p. B-2).[2] Although the longshoremen complained to their supervisors (Appendix, p. B-19), those supervisors never relayed the complaints to the shipowner, and the plaintiff did not contend that the shipowner ever knew of the malfunction (Appendix, p. A-4). When a malfunction of the brake caused a load of cargo to land unevenly and some sacks of cargo to spill off the load, the stevedore company's hatch tender directed the load with the remaining sacks in a loose pile to be raised about 15 feet. With full knowledge of the condition of the brake and after surveying the remaining sacks on the load and deciding there was no danger, the hatch tender decided to allow the load to remain suspended over the longshoremen while they cleaned up the spill. (Appendix, pages B-2, B-3).[3] About ten minutes later, more sacks fell, dislodged because of the slipping brake, and injured plaintiff (Appendix, p. B-3).

The district court granted the shipowner's summary judgment motion, holding that the shipowner could not be held negligent and that the longshoremen's working under the suspended load was so blatantly dangerous that any pre-existing defect in the winch could not be a proximate cause of the injury (Appendix A).

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[2]The facts set forth here are those the courts below considered to be least favorable to the shipowner.

[3]The hatch tender had testified at his deposition that it was solely his decision whether to suspend the load over the men working below. (Deposition of Alvin H. Botler, p. 48.)

The Court of Appeals reversed in an opinion which expressly rejected the decisions of the Second, Fourth and Fifth Circuits applying standards derived from the analogy to the duties of land-based premises owners in sections 343 and 343A of the Restatement (Second) of Torts (1965) (Appendix, pp. B-12, B-13). Instead, the Court of Appeals for the Ninth Circuit, in reliance on *Anderson v. Iceland Steamship Co.*, 431 F. Supp. 869 (D. Mass. 1977), adopted a new standard of care under which it was said the shipowner might be found liable (Appendix, p. B-11). *Anderson*, a case imposing a duty on the shipowner not to discharge cargo posing a danger to longshoremen, had, however, been reversed by the Court of Appeals for the First Circuit. 585 F.2d 1142 (1978).

The shipowner petitioned for rehearing and rehearing *en banc*, arguing that the standard of care derived from the trial court opinion in *Anderson* received no support from the First Circuit opinion in *Anderson* and placed the Ninth Circuit in conflict not only with the Courts of Appeals of the Second, Fourth and Fifth Circuits, as noted by the Court (Appendix, pp. B-12, B-13), but also with those of the First, Third and Seventh Circuits, and probably the Sixth Circuit, and with prior decisions of its own. Denying a rehearing, the Court of Appeals conceded conflict with the recently decided *Clemons*[4] case in the Seventh Circuit, but claimed that there was no conflict with either the First or Third Circuits,[5] since those Circuits, had re-

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[4]Clemons v. Mitsui O.S.K. Lines, Ltd., 596 F.2d 746 (7th Cir. 1979).

[5]This claim was made despite the court's having cited and expressly rejected a Third Circuit case which had embraced a relinquishment of control standard (Appendix, p. B-21, n.7).

jected application of sections 343 and 343A (Appendix, pp. C-2, C-3). The new Ninth Circuit standard, which requires the shipowner to divine danger in the stevedore's considered decision to operate in the face of known conditions, remained unmodified, although it lacked support in any other court of appeals decisions and was in conflict with the law of the First, Second, Third, Fourth, Fifth and Seventh Circuits.

REASONS FOR GRANTING THE WRIT

The Writ of Certiorari should be granted because the Court of Appeals has:

1. Rendered a decision in this case in conflict with decisions on the same matter of five other Courts of Appeals, those of the Second, Third, Fourth, Fifth and Seventh Circuits, by its own acknowledgement, and

2. Decided an important question of federal law which has not been, but should be, settled by this Court.

Background of the Question

The issue here arises under 33 U.S.C. section 905(b), a subsection enacted in 1972 as one of the major reforms of the Longshoremen's and Harbor Workers' Compensation Act at that time. By its provisions Congress eliminated unseaworthiness as a ground of recovery by the longshoreman against the vessel and restricted his recovery to an action for negligence, under new conditions furthering the policy of the Act. The legislative history, supported by court decisions since, shows that the new action for negligence is

to be uniform throughout the country[6] but not based upon maritime doctrines.[7] Rather it is to be based upon traditional standards ashore so as to "place an employee injured aboard a vessel in the same position he would be if he were injured in non-maritime employment ashore".[8] The announced policy of the changes made was to establish a fully adequate system of compensation benefits[9] and thus assure that the employer (who has ordinarily the best opportunity to promote safety)[10] "bears the cost of unsafe conditions . . . [so as] to strengthen the employer's incentive to provide the fullest measure of on-the-job safety"[11] and reduce reliance upon suits against vessels.[12] More particularly it was stated that "a vessel shall not be liable . . . for the manner or method in which stevedores or employees of stevedores . . . perform their work".[13]

When longshoremen's negligence cases began to arise under section 905(b), there was no doubt, of course, that the shipowner would be liable for active negligent behavior toward the longshoreman and few cases involving such con-

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[6]S. Rep. 92-1125, 92nd Cong., 2d Sess. 12; H.R. Rep. No. 92-1441, 92d Cong., 2d Sess., *reprinted in* [1972] U.S. Code Cong., & Ad. News 4698, 4705.

[7]S. Rep., *supra* note 6, at 10; H.R. Rep., *supra* note 6, at 4703.

[8]*Ibid;* "The Committee intends . . . that the vessel shall not be liable . . . unless it is proven to have acted or have failed to act in a negligent manner such as would render a land-based third party in non-maritime pursuits liable under similar circumstances." S. Rep., *supra* note 6, at 11; H.R. Rep., *supra* note 6, at 4704.

[9]S. Rep., *supra* note 6, at 2, 5; H.R. Rep., *supra* note 6, at 4699, 4700.

[10]Italia Societa per Azioni di Navigazione v. Oregon Stevedoring Co., 376 U.S. 315, 1964 A.M.C. 1075 (1964).

[11]S. Rep., *supra* note 6, at 2; H.R. Rep., *supra* note 6, at 4699.

[12]*See* S. Rep., *supra* note 6, at 4.

[13]S. Rep., *supra* note 6, at 10; H.R. Rep., *supra* note 6, at 4703.

duct have reached the appellate courts.[14] The cases the appellate courts were faced with were of a different character, involving conditions of equipment or of working areas voluntarily accepted by the stevedores or operating methods used by them, as contrasted with active negligent behavior of the vessels. The courts, in order to effectuate the clear policy of the Amendments, began a quest to find in traditional non-maritime sources a suitable definition of the limited circumstances, if any, in which the shipowner should shoulder burdens of preparation, supervision and oversight for the safety of the longshoreman working aboard under the actual control of his stevedore employer. It is that quest which the Court will see illustrated in the decisions listed below, with which the present case is in conflict.

The Conflicts

Prior to the decision in this case the Courts of Appeals, in their quest for a standard limiting the shipowner's duty to oversee the stevedore's safety functions, found three principal formulas. In a number of decisions they applied (as the District Court did in the instant case) sections 343 and 343A of the Restatement (Second) of Torts, giving effect to the provision of section 343A with respect to known or obvious conditions by expecting that the stevedore's supervisors and safety organization might be relied upon to discover and cope with such conditions.[15] In another

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[14]For a case of active negligence, *see* Prohoroff v. Kawasaki Kisen Kaisha, Ltd., 90 Cal. App. 3d 640, 153 Cal. Rptr. 287 (1979), where the crew put grease on the deck.

[15]Clemons v. Mitsui O.S.K. Lines, Ltd., 596 F.2d 746, 1979 A.M.C. 999 (7th Cir. 1979); Lopez v. A/S, D/S, Svendborg, 581 F.2d 319, 1978 A.M.C. 1655 (2d Cir. 1978); Canizzo v. Farrell Lines, Inc., 579 F.2d 682, 1978 A.M.C. 1920 (2d Cir. 1978); Lubrano v. Royal Netherlands Steamship Co., 572 F.2d 364, 1978 A.M.C. 826

group of decisions the Courts of Appeals implemented the policy of the Act by declining to impose the duty of supervision upon the vessel where it was shown that the shipowner had relinquished full control of the situation to the stevedore.[16] In still another group of cases, which is quite analogous to the last one, substantially the same effect is reached by explicit resort again to the Restatement (Second) of Torts, this time to sections 409 and 414, dealing with the duties retained by those who employ independent contractors.[17]

Although there is conflict in detail among the three groups of cases just described, the same results will probably be reached in most cases under any of their standards. More important than their differences is what they have in

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(2d Cir. 1978); Hickman v. Jugoslavenska Linijska Plovidba Rijeka, Zvir, 570 F.2d 449, 1978 A.M.C. 355 (2d Cir. 1978); Ruffino v. Scindia Steam Navigation Co., 559 F.2d 861, 1977 A.M.C. 1289 (2d Cir. 1977); Napoli v. Hellenic Lines, Ltd., 536 F.2d 505, 1976 A.M.C. 551 (2d Cir. 1976); Chavis v. Finnlines Ltd., 576 F.2d 1072 (4th Cir. 1978); Riddle v. Exxon Transportation Co., 563 F.2d 1103, 1978 A.M.C. 741 (4th Cir. 1977); Anuszewski v. Dynamic Mariners Corp., 540 F.2d 757, 1976 A.M.C. 2048 (4th Cir. 1976); Samuels v. Empresa Lineas Maritimas Argentinas, 573 F.2d 884, 1978 A.M.C. 1647 (5th Cir. 1978); Wiles v. Delta Steamship Lines, Inc., 574 F.2d 1338, 1978 A.M.C. 2427 (5th Cir. 1978); Brown v. Mitsubishi Shintaku Ginko, 550 F.2d 331, 1977 A.M.C. 989 (5th Cir. 1977); Gay v. Ocean Transport & Trading, Ltd., 546 F.2d 1233, 1977 A.M.C. 996 (5th Cir. 1977).

[16]Cox v. Flota Mercante Grancolombiana, S.A., 577 F.2d 798, 1978 A.M.C. 1277 (2d Cir. 1978); Hickman v. Jugoslavenska Linijska Plovidba Rijeka, Zvir, 570 F.2d 449, 1978 A.M.C. 355 (2d Cir. 1978); Hurst v. Triad Shipping Co., 554 F.2d 1237, 1977 A.M.C. 1625 (3d Cir. 1977); Munoz v. Flota Merchante Grancolombiana, 553 F.2d 837, 1977 A.M.C. 843 (2d Cir. 1977); Briley v. Charente Steamship Co., 572 F.2d 498 (5th Cir. 1978); Wescott v. Impresas Armadoras, S.A., 564 F.2d 875, 1979 A.M.C. 930 (9th Cir. 1977).

[17]Rich v. United States Lines, Inc., 596 F.2d 541 (3d Cir. 1979); Hurst v. Triad Shipping Co., *supra* note 16; Anderson v. Iceland Steamship Co., 585 F.2d 1142 (1st Cir. 1978); Ruffino v. Scindia Steam Navigation Co., *supra* note 15.

common: recognition of the need for reasonable limitations upon the circumstances when the shipowner must undertake an active duty of care for the safety of the longshoreman, especially in respect of safety inspections and supervision. The decision of the court below in this case conflicts with the decisions of other Courts of Appeals, not only in formulation of standards and in results but, even more importantly, in its rejection of even the attempt to formulate such a standard for the creation of a shipowner's duty, for which the other courts have sought.

The Court of Appeals below expressly rejected the authority of each of the lines of cases described and cited above. The court was "not unmindful" that the Second, Fourth and Fifth Circuits had defined negligence in terms of sections 343 and 343A, but nevertheless chose not to follow them: "We decline to follow the lead of these Circuits . . . ." 598 F.2d at 486, Appendix, pp. B-12, B-13. Similarly the court recognized the line of cases focusing on the stevedore's control and the line deriving limitation of duty from Restatement sections 409 and 414. "[W]e do not follow those cases which have focused . . . on whether the shipowner relinquished control of the stevedoring . . . ." 598 F.2d at 490, Appendix, p. B-21. Those cases, as the court noted in a footnote which included specific mention of sections 409 and 414, were *Cox, Hickman, Hurst,* and *Munoz.* 598 F.2d at 490 n. 7, Appendix, p. B-21.

But the court below went much further than to reject the specific bases on which the shipowner's duty had previously been limited; it rejected the very idea of restriction. The court quoted from a district court opinion:

> Discussions relating to invitees, contractors, primary and second responsibilities, obviousness of dangers, and the relinquishment of control all have the tendency to steer courts away from a balance of the risk of harm against the utility of the particular conduct in question. [598 F.2d at 488, Appendix, p. B-16, *quoting Gallardo v. Westfal-Larsen & Co.*, 435 F.Supp. 484, 496, 1977 A.M.C. 1325, 1342 (N.D. Cal. 1977).]

Thus, this case presents not only specific conflicts of standards and results with prior cases, but also an even more fundamental conflict. American tort law generally imposes firm limits on the duty to take affirmative action, but does not impose such limits on the duty to act reasonably when one does act. As illustrated by the quotation from *Gallardo* regarding the "utility of . . . conduct", the opinion below obliterates the distinction between the duty to act at all and the duty to make one's actions reasonable. *Cf.* 2 F. Harper & F. James, *The Law of Torts* 1015, 1017, 1044-58 (1956).

This is not merely a quibble over the formulation of similar standards. The conscientious application of any of the rejected standards would have led to a different conclusion. The condition of the winch was obvious and known to the stevedore company. Since the condition of the winch was one which the shipowner would expect the stevedore to report to it[18] and since it "was not the type of danger

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[18]The applicable longshore regulation requires:

> Any defect or malfunction of winches shall be reported immediately to the officer in charge of the vessel. [Safety and Health Regulations for Longshoring, 29 C.F.R. § 1918.53(a)(5).]

that must be faced notwithstanding knowledge",[19] a court applying standards drawn from sections 343 and 343A would have reached a different result.

If the court had followed the line of cases focusing on relinquishment of control, for example its own *Wescott* opinion which relies heavily on the Third Circuit's *Hurst* case, it would have reached a different conclusion. In the *Wescott* case, the court had been persuaded that because there was "an obvious dangerous condition", and the stevedore made no attempt "to change its method of operation" and the stevedore "of its own volition, chose to go ahead despite the condition", there was "no basis for imposing any liability upon the shipowner herein". 564 F.2d at 883, 1979 A.M.C. at 941. Such an analysis would result in a decision in favor of the shipowner in this case.

If the court had not rejected the cases relying on sections 409 and 414 of the Restatement, it would have followed *Anderson*.[20] In that case the Court of Appeals for the First Circuit determined that the shipowner did not owe a duty to protect plaintiff from the danger of the cargo, because that danger was "open, obvious and capable of being protected against by relatively simple measures known, available and practiced in the stevedoring trade". 585 F.2d at 1151. A court applying this standard would have found that the dangers which caused Santos' injury were likewise known and capable of being protected against.

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[19]Gay v. Ocean Transport & Trading, Ltd., 546 F.2d 1233, 1242, 1977 A.M.C. 996, 1008 (5th Cir. 1977); Brown v. Mitsubishi Shintaku Ginko, 550 F.2d 331, 334, 1977 A.M.C. 989, 994 (5th Cir. 1977).

[20]Anderson v. Iceland Steamship Co., 585 F.2d 1142 (1st Cir. 1978).

And finally, if the court below had not rejected the very idea of imposing limits on the duty to act affirmatively for the protection of others, the result would have been very different indeed. Instead of announcing its standard of care as a startling discovery which disposed of the case, the court would have recognized its formulation of the reasonable man standard as a mere platitude. Whenever one has a duty, one must discharge the duty by the exercise of reasonable care under the circumstances. *See Harper & James, supra.* The court would have further recognized that the 1972 Amendments and the relationship between stevedore and shipowner pose issues which are not adequately resolved by a negligence standard which imposes a responsibility to act to protect the employees of the expert stevedore contractor from the effects of the latter's considered decisions.

Thus, if the court below had recognized the importance of applying concepts of duty under the 1972 Amendments, its decision would have been similar to one or more of the lines of decisions it rejected, since those lines of cases have sought and found workable rules for realization of the Congressional policy and the 1972 Amendments.

Importance of the Question

The question is important first because of its nature. It is clear from the history that Congress intended a major reform by the 1972 Amendments to the Longshoremen's and Harbor Workers' Compensation Act. The history also indicates a number of policy considerations to be given effect in the Act, such as increased reliance upon the predictability, regularity and adequacy of compensation benefits, the promotion of safety and the reduction of economic loss

through legal proceedings. To describe the longshoreman's new and more limited rights against the vessel, new subsection 905(b) provided but a single word of substance, "negligence", a term which has always been highly variable in content according to the circumstances. Thoughtful exploration and interpretation of its substance are needed if the section is to be given shape to implement the important policies of the Act.

The question presented is important also because of the frequency with which it arises. The history of longshoremen's injury cases in this Court and the number of them to be readily found in the law reports will remind the Court that longshoremen's suits against the shipowner are potentially, and actually, numerous. The numerous appellate court decisions cited in footnotes to the text above, concerning the question presented in this case, should go far to establish its importance.

Whether or not the summary judgment itself be reinstated in this case, the question of the legal standard to be applied is important for consideration by the Court at this time because of the effect that the lower court's decision is already having upon other cases, not only in its own court but in others. The doctrine of the opinion below has been explicitly applied by other panels of the same court in *Bachtel v. Mammoth Bulk Carriers, Ltd. and Twin Harbor Stevedoring Co.*, 9th Cir. Nos. 77-3043 and 77-3645, decided August 20, 1979, and *Lawson v. United States*, 9th Cir. No. 77-2510, decided August 21, 1979, to produce results which could not have been reached under prior decisions of the same or other courts of appeals. The decision below has been cited and evidently followed also

in *Matthews v. Ernst Russ Steamship Co.*, 7th Cir. 78-2547, decided August 20, 1979, and most recently it has again been cited and relied on in *Griffith v. Wheeling-Pittsburgh Steel Corp.*, 3d Cir. Nos. 78-2159, 78-2160 and 78-2161, decided August 24, 1979.

The importance of properly defining the scope of the shipowner's duty to longshoremen is magnified by the decision of this Court in *Edmonds v. Compagnie Generale Transatlantique*, No. 78-479 (June 27, 1979), in which a petition for rehearing is before the Court and a motion to consider that petition together with this petition for certiorari has been filed. *Edmonds* presents the question whether a shipowner, responsible for only 20% of the fault, is liable to the longshoremen for 90% of the damages where the longshoreman was 10% at fault and the stevedore company 70%. The effect of the adoption of the virtually unlimited scope of a shipowner's duty in *Santos* must be evaluated in the light of whether the defendant found liable under such a standard will be able to shift the burden, or any of it, to the party actually responsible.

This Court long ago foreclosed contribution between the shipowner and the stevedore employer. *Halcyon Lines v. Haenn Ship Ceiling & Refitting Corp.*, 342 U.S. 282, 1952 A.M.C. 1 (1952). The 1972 Amendments themselves forbid indemnity from the stevedore employer. "[T]he employer shall not be liable to the vessel for such damages directly or indirectly and any agreements or warranties to the contrary shall be void."[21] If this Court is to continue to hold, as it did in its initial decision in *Edmonds*, that the ship-

[21] 33 U.S.C. § 905(b).

owner is liable for all the plaintiff's damages when it is negligent at all, then a decision vastly increasing the scope of the shipowner's duty has a dramatic effect on shipowners, stevedore companies, and the Congressional aims for the 1972 Amendments. If the shipowner is to be held liable virtually vicariously for a failure to supervise the independent stevedore contractor and to be held so liable without the possibility of relief by way of contribution, indemnity or reduction of damages for the concurrent fault of others, drastic burdens have been imposed on the shipowner. Such a situation calls for careful scrutiny by this Court to determine whether the goals of the 1972 Amendments have been implemented or frustrated.

RELATED CASES

The question raised by this case is the same question expected to be raised in *Bachtel v. Mammoth Bulk Carriers, Ltd. and Twin Harbor Stevedoring Co.*, and in *Matthews v. Ernst Russ Steamship Co.*, in both of which cases it is expected that petitions for certiorari will shortly be filed. The question is also intimately related, as shown above, to the question arising under the same statute in *Edmonds v. Compagnie Generale Transatlantique*, No. 78-479, in which case attention has been called to the question by Motion to Defer Ruling on Petition for Rehearing.

CONCLUSION

For the foregoing reasons, we respectfully submit that this Court should grant a Writ of Certiorari to review the decision of the Court of Appeals and should consolidate the case for hearing with other cases in which petitions for writs of certiorari are filed raising the same questions and should hear all such cases in conjunction with the rehearing of *Edmonds v. Compagnie Generale Transatlantique,* No. 78-479.

Respectfully submitted,

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(Appendices Follow)

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Appendix A

Lauro de los Santos,

Plaintiff,

vs.

Scindia Steam Navigation Co., Ltd., of Bombay, India,

Defendant.

United States District Court
Western District of Washington

September 1, 1976

No. C74-720S,

WALTER T. MCGOVERN, D.J.:

This matter comes on for consideration upon the defendant Scindia Steam Navigation Co., Ltd.'s Motion for Summary Judgment of dismissal pursuant to Rule 56, Federal Rules of Civil Procedure.

The Court having carefully considered the records and files herein, including but not limited to the agreed pretrial order, the depositions taken of plaintiff Lauro De Los Santos, Lester Hawran, and Alvin H. Botler; plaintiff's Memorandum of Authorities and Supplemental Memorandum in opposition to the Motion; and defendant's Memorandum and Reply Brief in support of the Motion, concludes that the defendant's Motion should be granted.

The Law.

In 1972 amendments to the Longshoremen's and Harbor Workers' Compensation Act (33 U.S. Code, sec. 901 *et seq.*) became effective which eliminated causes of action of long-

shoremen against vessels based upon "unseaworthiness" standards and instead restricted the longshoremen to actions based upon negligence theories. The pertinent language of the Amendment, Section 905(b), states as follows:

> "In the event of injury to a person covered under this chapter caused by the negligence of a vessel, then such person * * * may bring an action against such vessel as a third party * * *. The liability of the vessel under this subsection shall not be based upon the warranty of unseaworthiness or a breach thereof at the time the injury occurred." [33 U.S. Code sec. 905(b).]

The divorcement between "unseaworthiness" and "negligence" is complete under the law. *Usner* v. *Luckenbach Overseas Co.*, 400 U.S. 494, 1971 AMC 277 (1971). That Congress intended to substitute negligence principles in place of theories of maritime liability utilized in earlier cases (such as "unseaworthiness" or "nondelegable duty") is well established by the legislative history of Amendment, Section 905(b). 1972 U.S. Congressional and Administrative News, 4703-4705. While there is some debate over the appropriate standard of care a vessel owes a longshoreman under the negligence action created by sec. 905(b), the Court is persuaded that Congress intended to have land-based standards of negligence be applied; these standards are found best expressed in the Restatement (Second) of Torts sec. 343 and sec. 343A (1965). See, *Crowshaw* v. *Koninklijke Nedlloyd B.V. Rijswijk*, 1975 AMC 2630, 398 F. Supp. 1224 (D. Ore., 1975); *Frasca* v. *Prudential Grace Lines*, 1975 AMC 1130, 394 F. Supp. 1092, 1097 (D.C. Md., 1975); *Anuszewski* v. *Dynamic Mariners Corp.*, 1975 AMC 899, 391 F. Supp. 1143 (D.C. Md., 1975); *Citizen* v. *M/V Triton*, 1976 AMC 509, 384 F. Supp. 198, 201, 202 (E.D.

Tex., 1974); 1A BENEDICT on *Admiralty* sec. 112, at 6-10 (7th Ed., 1973).

It is clear under Federal land-based negligence standards that a shipowner is not liable for dangerous conditions created by the stevedore's negligence while the stevedore was in exclusive control over the manner and area of the work (*Frasca, supra; Crowshaw, supra; Slaughter* v. *S.S. Ronde*, 1974 AMC 290, 390 F. Supp. 637 (S.D. Ga., 1974)), nor is the shipowner under a duty to warn the stevedore or his employees of dangers or open and obvious defects which are known to the stevedore or his employees or which are so obvious and apparent that they may reasonably be expected to discover them. *Ramirez* v. *Toko Kaiun K.K.*, 1975 AMC 85, 385 F. Supp. 644, 651 (N.D. Cal., 1974); Restatement (Second) of Torts sec. 343A (1965); PROSSER, *Law of Torts*, p. 403 (2 ed., 1964).

The Facts.

The facts of this case are generally not in dispute and are well set out in the pretrial order and depositions taken of plaintiff (a longshoreman working in the hatch at the time of the accident), Mr. Hawran (the winch driver), and Mr. Botler (the hatch tender). Plaintiff alleges that a winch, which was lowering pallets loaded with sacks of bulgar wheat into the No. 3 hatch, was defective and that this defective winch proximately caused the plaintiff's injuries. Defendant denies that the winch was defective and asserts that, even if the winch was defective, the defective condition was open and obvious to the plaintiff and was in fact known by the plaintiff to be a dangerous condition; that the defective condition was not known to the defend-

ant, nor could the defendant reasonably be expected to have known of the condition; and that the alleged defective condition had only a remote cause-in-fact relationship to plaintiff's accident and was not the proximate cause thereof.

Viewing the facts in a light most favorable to the plaintiff, the Court finds there is no genuine issue of material fact remaining in dispute. Following an initial spillage of sacks caused by the pallet striking the pallet jack (Pretrial Order, Agreed Fact No. 4), the pallet was raised 15 feet overhead by the winch operator and was left to swing overhead of plaintiff as plaintiff worked to clean up the spilled sacks from the hatch floor below. (Agreed Fact No. 5; Deposition of Hawran, pp. 58-59.) There is no dispute that the premises were in exclusive control of the stevedores during the loading operation. Plaintiff does not controvert defendant's claim that no one from the ship's crew was ever informed of the winch's condition prior to the accident. Yet, plaintiff rests his argument on the supposition that the defendant should have known of the condition of the winch and should have taken appropriate action to remedy the situation, and that defendant's failure to so act proximately caused plaintiff's injuries. This argument ignores the applicable principles of negligence law cited above and contained within the Restatement (Second) of Torts sec. 343 and sec. 343A: Even if the ship's gear had been defective (a condition which the Court finds the shipowner did not know nor should it reasonably have been expected to know, given the exclusive control of the gear by the stevedores during the relevant time period), the defendant cannot be held liable under the facts of this case

as a matter of law. There is no dispute that the "jumpiness" of the winch and the positioning of the unevenly loaded pallet after the initial spillage was open and obvious to the plaintiff. (Plaintiff's deposition, p. 56, line 8 through p. 57, line 11.) Indeed, in his deposition plaintiff conceded that the condition of the winch and the positioning of the pallet swinging overhead seemed "dangerous" to him:

> "Q. Was there some reason you started to clean up the sacks before they moved the load overhead? Wasn't it dangerous to go underneath the swinging load?
>
> A. Well, it is, yes.
>
> Q. Did you think it was dangerous to clean up those sacks with the pallet overhead?
>
> A. Well, I am telling you that was dangerous, yes, but it was the practice, we are asked to do the job, you know, cleaning up things for our own good."

Plaintiff's Deposition, p. 58, lines 1-5.

In a case remarkably on point, *Cummings* v. *"Sidarma" Soc.*, 409 F. Supp. 869, 872 (E.D. La., 1976), the Court there held that a vessel owner did not breach its duty of care under the Longshoremen's Act as amended where the alleged defective condition (bales ship's of rubber stowed freely in void spaces between boxed cargo and the ship's skin) was obvious to the longshoremen, and where the position of the bales was expressed during the routine discharging operation.

Here, the Court similarly finds that the manner in which the accident occurred, the fact that plaintiff's activities were so dangerous and the fact that plaintiff undertook his actions free from any direction by the defendant while

recognizing that the circumstances were so dangerous, is such that the defendant cannot be held liable as a matter of law. In addition to the findings above, the Court finds that the alleged defective condition of the winch had only a remote cause-in-fact relationship to plaintiff's accident and could not have been the proximate cause thereof as a matter of law. Either finding is a sufficient basis upon which to grant the defendant's Motion.

Accordingly, defendant Scindia Steam Navigation Co., Ltd.'s Motion for Summary Judgment of dismissal is Granted.

Appendix B

United States Court of Appeals,
Ninth Circuit

Lauro de los Santos, Appellant, vs. Scindia Steam Navigation Co., Ltd., Appellee, Seattle Stevedore Co., Intervenor.	No. 76-3225

May 1, 1979

Rehearing Denied June 28, 1979.

Appeal from the United States District Court
for the Western District of Washington

Before DUNIWAY and CHOY, Circuit Judges, and
GRANT,* District Judge.

DUNIWAY, Circuit Judge:

Several 50 pound sacks of grain tumbled off a pallet, severely injuring appellant longshoreman Lauro De Los Santos, who was working in a ship's hold. Santos sued appellee shipowner Scindia Steam Navigation Co. ("Scindia"), alleging that the accident had occurred because the shipowner had negligently failed to repair the winch by means of which the pallet was lowered into the hold. The district court granted the shipowner's motion

*The Honorable Robert A. Grant, Senior United States District Judge for the Northern District of Indiana, sitting by designation.

for summary judgment. Its opinion is reported at 1976 A.M.C. 2583. We reverse.

I. *The Facts*

Stated in the light most favorable to Santos, against whom summary judgment was granted, the facts are these:

On the evening of December 10, 1972, Santos and other longshoremen employed by the Seattle Stevedoring Company were loading a cargo of wheat into a hold in Scindia's vessel, the M/S JALARATNA. The longshoremen used a winch that was part of the ship's gear to lower wooden pallets, each carrying seventy fifty-pound sacks of wheat, into the hold.

The ship's winch was unusual in that its controls were located on a platform more than 25 feet above the main deck. From that point, the winch driver could not actually see a pallet of sacks as he lowered it into the hold. He thus had to rely upon the hatch tender to signal to him when to start and stop the winch. Santos and three other men were in the hold. When a pallet reached the bottom of the hold, Santos and his co-workers would stow the sacks. Seattle Stevedoring controlled the loading procedure.

The winch's braking mechanism had continually malfunctioned during the two days prior to the accident and on the day of the accident in that, when the winch driver tried to stop a load, the load continued to fall for several feet before coming to a stop. The winch continued malfunctioning on the night of the accident. As the winch driver lowered the loaded pallet into the hold, the hatch tender signaled him to stop its descent. The winch driver

applied the brake, but the pallet kept falling. When it struck a pallet jack, on which it should have come to rest, about half the sacks spilled off the pallet.

The hatch tender then had the winch driver raise the pallet, carrying the remaining sacks in a loose pile and not fastened down, about fifteen feet up so that Santos and the other men could clean up the spilled sacks. After the winch driver had raised the pallet, the hatch tender looked over the remaining sacks. He thought that they looked stable enough that he concluded that no more sacks would spill off and endanger the men cleaning-up below. Nevertheless, about ten minutes later several more sacks fell off the pallet and landed on Santos.

The parties disagree about what caused those sacks to work loose and fall. The district court accepted the shipowner's position that the pallet had swung back and forth, and that this swinging loosened the sacks. Santos points to deposition testimony which indicates little if any swinging. He relies upon testimony tracing the accident to further malfunctioning of the winch's braking mechanism. The winch driver explained that even though he had the controls set to hold the pallet stationary, the pallet began slipping down into the hold three or four times during the ten minutes, requiring him to pull it back up again each time so that it would not interfere with the cleanup. Santos argues that the defective condition of the ship's winch caused the repeated slipping, and that this slipping and pulling back up caused the additional sacks to work loose and fall.

II. *The Applicable Law*

The Longshoremen's and Harbor Workers' Compensation Act defines the rights of longshoremen injured while taking part in stevedoring operations. Just before Santos' accident, Congress had passed the Longshoremen's and Harbor Workers' Compensation Act Amendments of 1972, Pub.L. 92-576, 86 Stat. 1251, amending 33 U.S.C. §§ 901-950. The Amendments made sweeping changes in the legal relationships among injured longshoremen, stevedores, and shipowners. Before the Amendments, an injured longshoreman could sue a shipowner for negligence, and also for breach of a warranty of seaworthiness, a form of liability without fault. *Seas Shipping Co., Inc. v. Sieracki,* 1946, 328 U.S. 85, 66 S.Ct. 872, 90 L.Ed. 1099. If the longshoreman could establish that he had been injured by unsafe conditions aboard the ship, he recovered even if the shipowner had not been negligent. Under *Ryan Stevedoring Co. v. Pan-Atlantic S.S. Co.,* 1956, 350 U.S. 124, 76 S.Ct. 232, 100 L.Ed. 133, the vessel owner could in turn seek indemnity against the stevedore company when a substandard performance by the stevedore or its longshoremen had brought the unseaworthy conditions into play. The injured longshoreman could not sue the stevedore, but he was entitled to workers' compensation type benefits without regard to fault.

Under the 1972 Amendments, the injured longshoreman lost his action against the shipowner for unseaworthiness, but in return Congress granted the longshoreman significantly higher compensation benefits. Congress also ended the shipowner's right to indemnity from the stevedore. The shipowner had less need for indemnification because

the abolition of the unseaworthiness action left it liable only when an injured longshoreman could prove it negligent. House Report No. 92-1441, 92d Cong., 2d Sess., reprinted in 1972 U.S. Code Cong. and Admin.News, pp. 4698-4705; Senate Report No. 92-1125, 92d Cong., 2d Sess., pp. 8-12; *Davison v. Pacific Inland Nav. Co., Inc.*, 9 Cir., 1978, 569 F.2d 507, 511-13. *Note*, "The Injured Longshoreman v. The Shipowner After 1972: Business Invitees, Land-Based Standards, and Assumption of Risk," 28 *Hastings L.J.* 771, 773-79 (1977). [hereafter, "The Injured Longshoreman"] *Cooper Stevedoring Co. v. Kopke, Inc.*, 1974, 417 U.S. 106, 113, fn. 6, 94 S.Ct. 2174, 40 L.Ed.2d 694.

The Act as amended explicitly preserves the injured longshoreman's right to sue the shipowner for negligence. 33 U.S.C. § 905(b) provides that:

> In the event of injury to a person covered under this chapter caused by the negligence of a vessel, then such person . . . may bring an action against such vessel as a third party. . . . The liability of the vessel under this subsection shall not be based upon the warranty of seaworthiness or a breach thereof at the time the injury occurred. . . .

In the case at bar, Santos alleged that Scindia had been negligent within the meaning of § 905(b), and that Scindia's negligence had proximately caused his injuries. He timely asserted his right to have the facts tried to a jury.

[1] When a party moves for summary judgment under Fed.R.Civ.P. 56, all of the facts and all reasonable inferences to be drawn from those facts must be viewed in the light most favorable to the party against whom the motion is made. The trial court may grant the motion for sum-

mary judgment only when no material questions of fact remain. *Poller v. Columbia Broadcasting Systems, Inc.*, 1962, 368 U.S. 464, 467, 82 S.Ct. 486, 7 L.Ed.2d 458; *United States v. Diebold, Inc.*, 1962, 369 U.S. 654, 655, 82 S.Ct. 993, 8 L.Ed.2d 176; *United States v. Perry*, 9 Cir., 1970, 431 F.2d 1020, 1022; *Radobenko v. Automated Equipment Corporation*, 9 Cir., 1975, 520 F.2d 540, 543; *United States v. Bissett-Berman Corporation*, 9 Cir., 1973, 481 F.2d 764, 767. Furthermore, we have emphasized that " '[i]ssues of negligence are ordinarily not susceptible of summary adjudication.' " *Arney v. United States*, 9 Cir., 1973, 479 F.2d 653, 660. *See also Leaf v. United States*, 9 Cir., 1978, 588 F.2d 733, 736.

Here, Santos contends that the district court granted the motion for summary judgment only after resolving a number of disputed material facts against him. Santos also argues that the district court applied an incorrect legal standard when it explicitly adopted the standard of negligence set forth in Restatement (Second) of Torts, §§ 343 and 343A. To pass upon these contentions, we must begin by determining what showing of negligence § 905(b) requires when an allegedly dangerous condition of the ship or its gear injures a longshoreman.[1]

The Act does not define "negligence." *Davis v. Inca Compania Naviera, S.A.*, W.D. Wash., 1977, 440 F.Supp.

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[1]In *Wescott v. Impresas Armadoras, S.A. Panama*, 9 Cir., 1977, 564 F.2d 875, 883, we quoted *Hurst v. Triad Shipping Co.*, 3 Cir., 1977, 554 F.2d 1237, 1251, 1252, for the proposition that a vessel owner owes no duty to protect longshoremen against defects in the equipment the longshoremen and stevedore bring aboard. In this case, it is undisputed that the winch was part of the ship and thus provided for use by the vessel owner.

448, 451; *Gallardo v. Westfal-Larsen & Co. A/S*, N.D. Cal., 1977, 435 F.Supp. 484, 492. In *Davison v. Pacific Inland Navigation Co., Inc.*, 9 Cir., 1978, 569 F.2d 507, 508-09, fn. 1, we specifically reserved the question of what standard of negligence is to be used in a case brought under the Act. We noted there that courts which have already considered the question have applied different standards. Santos' appeal requires us to arrive at a standard.

While the legislative history is not entirely clear, we read the House and Senate Committee Reports, cited *supra*, as calling upon the federal courts to fashion a negligence standard responsive to five specific concerns. *Cf. Gallardo v. Westfal-Larsen & Co. A/S, supra*, 435 F.Supp. at 491, 493.

First, Congress was concerned about safety. The Senate Committee on Labor and Public Welfare protested that longshoring had an injury frequency rate "well over four times the average for manufacturing operations," and called for safer working conditions when it insisted that "every appropriate means be applied toward improving the tragic and intolerable conditions which take such a heavy toll upon workers' lives and bodies. . . ." Senate Report at 2. The Amendments sought to strengthen economic incentives "to provide the fullest measure of on-the-job safety." House Report at 4699. The higher compensation benefits were meant to "assure that the employer bears the cost of unsafe conditions." Senate Report at 2. "Permitting actions against the vessel based on negligence" was meant to "meet the objective of encouraging safety." House Report at 4704. *Samuels v. Empresa Lineas Mariti-*

mas Argentinas, 5 Cir., 1978, 573 F.2d 884, 888 ("promotion of shipboard safety . . . a primary focus" of the negligence action); *Marant v. Farrel Lines, Inc.,* 3 Cir. 1977, 550 F.2d 142, 149, fn. 3 (concurring opinion); *Davis v. Inca Compania Naviera, S.A.,* W.D. Wash., 1977, 440 F.Supp. 448, 454, fn. 14. "Congress was concerned that the vessel owner not become lax in doing what it should reasonably be required to do to prevent injuries to the longshoremen." *Lucas v. "Brinknes" Schiffahrts Ges.* E.D.Pa., 1974, 379 F.Supp. 759, 769 (three-judge court).

Second, to assure uniformity Congress specified that it "intend[ed] that legal questions . . . be determined as a matter of Federal law." House Report at 4705. In *Wescott v. Impresas Armadoras, S.A. Panama,* 9 Cir., 1977, 564 F.2d 875, 882, we held that federal law continues to govern lawsuits between an injured longshoreman and a shipowner. *See also, Brown v. Ivarans Rederi A/S,* 3 Cir., 1976, 545 F.2d 854, 861-63; *Gox v. Flota Mercante Grancolombiana S.A.,* 2 Cir., 1978, 577 F.2d 798, 800-801, fn. 1; *Birrer v. Flota Mercante Grancolombiana,* D.Ore., 1974, 386 F.Supp. 1105.

Third, Congress wanted to make certain that it had really done away with longshoremen's actions based upon unseaworthiness. Concerned that some courts might continue holding vessels strictly liable for unsafe conditions by simply relabeling unseaworthiness "negligence," Congress emphasized that it intended the courts to define "negligence" in accordance with the land-based traditions of not imposing liability without regard to actual fault. *Gallardo, supra,* 435 F.Supp. at 492; *Giacona v. Capricorn Shipping*

Co., S.D.Tex., 1975, 394 F.Supp. 1189, 1192-194; The Injured Longshoreman, *supra*, at 778-79; *Lucas v. "Brinknes" Schiffahrts Ges, supra*, 379 F.Supp. at 767-68, 771-72. The Committee thus reported that they had "rejected the thesis that a vessel should be liable without regard to its fault." Senate Report at 8. House Report at 4702. Rather, Congress concluded that,

> it would be fairer to all concerned and fully consistent with the objective of protecting the health and safety of employees who work on board vessels for the liability of vessels as third parties to be predicated on negligence, rather than the no-fault concept of seaworthiness. This would place vessels in the same position, insofar as third party liability is concerned, as land-based third parties in non-maritime pursuits.
>
> The purpose of the amendments is to place an employee injured aboard a vessel in the same position he would be if he were injured in non-maritime employment ashore, insofar as bringing a third party damage action is concerned, and not to endow him with any special maritime theory of liability or cause of action under whatever judicial nomenclature it may be called, such as "unseaworthiness", "non-delegable duty", or the like. House Report at 4703. Senate Report at 10.

[2] Under the former law, some unsafe conditions which supported an unseaworthiness action might also have supported a negligence action. Because of the overlap between the two doctrines, Congress feared that its abolition of the unseaworthiness action might lead some post-Amendment courts to conclude that if a set of facts would have amounted to unseaworthiness, Congress meant to preclude a recovery based upon negligence. After collecting a num-

ber of cases to illustrate situations in which the unseaworthiness doctrine would no longer apply, the Committees carefully cautioned that their listing of disapproved cases was "not intended to reflect a judgment as to whether recovery on a particular factual setting could have been predicated on the vessel's negligence." Senate Report at 10. House Report at 4703-4704. Thus, consistent with Congress' intention to apply the land-based traditions of no liability without regard to fault, it is perfectly possible under the new law for an unseaworthy condition to give rise to a negligence recovery when a vessel fails "to take appropriate corrective action where it knows or should have known about a dangerous condition." House Report at 4704, Senate Report at 10; *Solsvik v. Maremar Compania Naviera, S.A.*, W.D.Wash., 1975, 399 F.Supp. 712, 715; *Slaughter v. Ronde*, S.D.Ga., 1974, 390 F.Supp. 637, 641, *aff'd per curiam*, 5 Cir., 1975, 509 F.2d 973.

[3] Fourth, Congress "intend[ed] that the admiralty concept of comparative negligence, rather than the common law rule as to contributory negligence, shall apply in cases where the injured employee's own negligence may have contributed to causing the injury." House Report at 4705. Senate Report at 12. Thus, a longshoreman's carelessness reduces but does not necessarily bar his recovery. *Shellman v. United States Lines, Inc.*, 9 Cir., 1975, 528 F.2d 675, 676-77, fn. 1; *Anderson v. Iceland S.S. Co.*, D.Mass., 1977, 431 F.Supp. 869, 872.

Finally, Congress "intend[ed] that the admiralty rule which precludes the defense of 'assumption of risk' in an action by an injured employee shall also be applicable." House Report at 4705, Senate Report at 12. *Davis, supra*, 440 F.Supp. at 454.

III. *The Applicable Standard.*

[4] We adopt the following standard of negligence for purposes of 33 U.S.C. § 905(b) actions:

> A vessel is subject to liability for injuries to longshoremen working on or near the vessel caused by conditions on the vessel if, but only if, the shipowner
>
> (a) knows of, or by the exercise of reasonable care would discover, the condition, and should realize that it involves an unreasonable risk of harm to such longshoremen, and
>
> (b) the shipowner fails to exercise reasonable care under the circumstances to protect the longshoremen against the danger.

See House Report at 4704; Senate Report at 10-11.[2] *Cf. Anderson v. Iceland S.S. Co.*, D.Mass., 1977, 431 F.Supp. 869, 873. We believe that the standard we adopt responds to all five of Congress' concerns. It will promote safety within a comparative negligence framework while avoiding both liability without fault and the defenses of contributory negligence and assumption of risk. *See Gallardo, supra,* 435 F.Supp. at 498.

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[2]The cited Committee Reports illustrated how the negligence standard described by Congress would apply in an actual case:

> So, for example, where a longshoreman slips on an oil spill on a vessel's deck and is injured, the proposed amendments to Section 5 would still permit an action against the vessel for negligence. To recover he must establish that: 1) the vessel put the foreign substance on the deck, or knew that it was there, and willfully or negligently failed to remove it; or 2) the foreign substance had been on the deck for such a period of time that it should have been discovered and removed by the vessel in the exercise of reasonable care by the vessel under the circumstances. House Report at 4704; Senate Report at 10-11.

The structure of Congress' illustration supports the standard of negligence we adopt today.

In adopting the "reasonable care under the circumstances" standard, we are not unmindful of the fact that the Second, Fourth, and Fifth Circuits have defined "negligence" under § 905(b) in terms of a landowner's duty to invitees under Restatement (Second) of Torts, § 343 and § 343A.[3] *See Davison v. Pacific Island Navigation Co., Inc.*, 9 Cir., 1978, 569 F.2d 507, 508, n.1.[4] We decline to follow the

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[3]These sections of the Restatement provide, in relevant part:

TITLE E. SPECIAL LIABILITY OF POSSESSORS OF LAND TO INVITEES

§ 343. Dangerous Conditions Known to or Discoverable by Possessor

A possessor of land is subject to liability for physical harm caused to his invitees by a condition on the land if, but only if, he

(a) knows or by the exercise of reasonable care would discover the condition, and should realize that it involves an unreasonable risk of harm to such invitees, and

(b) should expect that they will not discover or realize the danger, or will fail to protect themselves against it, and

(c) fails to exercise reasonable care to protect them against the danger.

§ 343A. Known or Obvious Dangers

(1) A possessor of land is not liable to his invitees for physical harm caused to them by any activity or condition on the land whose danger is known or obvious to them, unless the possessor should anticipate the harm despite such knowledge or obviousness.

[4]Cases adopting Restatement §§ 343 and 343A include *Canizzo v. Farrell Lines, Inc.*, 2 Cir., 1978, 579 F.2d 682, 684-85; *Samuels v. Empresa-Lineas Maritimas Argentinas*, 5 Cir., 1978, 573 F.2d 884, 885-86; *Wiles v. Delta Steamship Lines, Inc.*, 5 Cir., 1978, 574 F.2d 1339, 1340; *Lubrano v. Royal Netherlands Steamship Co.*, 2 Cir., 1978, 572 F.2d 364, 366; *Anuszewski v. Dynamic Mariners Corp., Panama*, 4 Cir., 1978, 540 F.2d 757, 758-59 (*per curiam*), aff'g D.Md., 1975, 391 F.Supp. 1143; *Brown v. Mitsubishi Shintaku Ginko*, 5 Cir., 1977, 550 F.2d 331, 333-34; *Gay v. Ocean Transport & Trading, Ltd.*, 5 Cir., 1977, 546, F.2d 1233, 1238; *Napoli v. [Transpacific Carriers, Etc.] Hellenic Lines*, 2 Cir., 1976, 536 F.2d 505, 508-509; *Bovia v. S/S Agia Erini, E.D.La.*, 1977, 433 F.Supp. 1020, 1022; *Croshaw v. Koninklijke Nedlloyd B.V. Rijswijk*, D.Ore., 1975, 398 F.Supp. 1224, 1229; *Frasca v. Prudential-Grace Lines, Inc.*, D.Md., 1975, 394 F.Supp. 1092, 1097-98, 1100-01; *Birrer v. Flota*

lead of those Circuits for three reasons.

First of all, § 343(b) and § 343A place limitations on a landowner's liability to an invitee inconsistent with Congress' explicit direction to reject common law rules of contributory negligence and assumption of risk in favor of applying the admiralty concept of comparative negligence.[5]

Mercante Grancolombiana, D.Ore., 1974, 386 F.Supp. 1105, 1112. *Cf. Cox v. Flota Mercante Grancolombiana*, 2 Cir., 1978, 577 F.2d 798; *Ruffino v. Scindia Steam Navigation Co., Ltd.*, 2 Cir. 1977, 559 F.2d 861; *Castel v. Moller, A.P.*, N.D.Cal. 1977, 441 F.Supp. 851; *Hite v. Maritime Overseas Corporation*, E.D.Tex., 1974, 380 F.Supp. 222, 226-27.

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[5]The Comments explaining § 343(b) and § 343A(1) show that these limitations on liability are based upon the substance of the proscribed defenses of contributory negligence and assumption of risk. Section 343A, comment e, for example, explains that:

> In the ordinary case, an invitee who enters land is entitled to nothing more than knowledge of the conditions and dangers he will encounter if he comes. If he knows the actual conditions, . . . and the dangers involved . . ., he is free to make an intelligent choice as to whether the advantage to be gained is sufficient to justify him in incurring the risk by entering or remaining on the land. *The possessor of the land may reasonably assume that he will protect himself by the exercise of ordinary care,* [i. e., avoid contributory negligence] *or that he will voluntarily assume the risk of harm if he does not succeed in doing so.* Reasonable care on the part of the possessor therefore does not ordinarily require precautions, or even warning, against dangers which are known to the visitor, or so obvious to him that he may be expected to discover them.
> (emphasis added)

In like fashion § 343, comment b limits the possessor's duty simply to putting the invitee in a position where the invitee "may decide intelligently whether or not to accept the invitation [to encounter the danger], or may protect himself against the danger if he does accept it." *See also*, § 343, comment d, § 343A, comment d, and § 496C, comment d. *Cf.* W. Prosser, *The Law of Torts*, Sec. 61, 394 (4th Ed., 1971).

The Restatement's standard of care incorporates the proscribed defenses into its definition of the possessor's duty when it allows the possessor to count on his invitees to discover conditions, realize their dangers, and then protect themselves against the dangers. To apply the limitations of § 343(b) and § 343A(1) to negligence suits under the Amendments would violate the legislative intent behind

We also fear that these limitations on liability would undercut Congress' intention to reduce the frequency of accidents by creating economic incentives to provide safer working conditions. *Davis, supra,* 440 F.Supp. at 454-55; D. Robertson, "Negligence Actions by Longshoremen Against Shipowners Under the 1972 Amendments to the Longshoremen's and Harbor Workers' Compensation Act," 7 *Journal of Maritime Law and Commerce* 447, 473.[6]

Secondly, the Supreme Court's decision in *Kermarec v. Compagnie General Transatlantique,* 1959, 358 U.S. 625,

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§ 905(b) because it would, in substance if not in form, give defendant shipowners the benefits of a partial or absolute bar to liability having the characteristics of a defense based upon contributory negligence or implied assumption of risk or both. *Brown v. Ivarans Rederi A/S,* 3 Cir., 1976, 545 F.2d 854, 863-64, fn. 10; *Hurst v. Triad Shipping Co.,* 3 Cir., 1977, 554 F.2d 1237, 1250, fn. 35; *Davis, supra,* 440 F.Supp. at 453-55; *Gallardo, supra,* 435 F.Supp. at 494; *Espinoza v. United States Lines, Inc.,* S.D.N.Y., 1978, 444 F.Supp. 405, 410; *Shepler v. Weyerhaeuser Co.,* 1977, 279 Or. 477, 494-97, 369 P.2d 1040, 1050-51 (in banc); *The Injured Longshoremen, supra,* 28 *Hastings L.J.* 780-81; *cf. Gay v. Ocean Transport & Trading, Ltd.,* 5 Cir., 1977, 546 F.2d 1233, 1241-242.

From the point of view of an injured plaintiff, to use a definition of shipowner's duty which incorporates assumption of risk may well be worse than allowing the shipowner to plead assumption of risk as an affirmative defense. If assumption of risk came into play as an affirmative defense, the shipowner would have the burden of proving that the longshoreman assumed the risk. On the other hand, because the longshoreman has the burden of proving the shipowner's breach of duty, to incorporate absence of assumption of risk into the definition of duty would force the injured plaintiff to bear the burden of proving that he did not assume the risk. *See The Injured Longshoreman, supra,* 781, fn. 90.

[6]In urging us to affirm the district court's application of Restatement §§ 343(b) and 343A, Scindia relies heavily upon Judge Orrick's use of the business invitee standard in *Ramirez v. Toko Kaium K.K.,* N.D. Cal., 1974, 385 F.Supp. 644. We note that in *Gallardo v. Westfal-Larsen & Co.,* N.D. Cal., 1977, 435 F.Supp. 484, and in *Darwin v. United States,* N.D.Cal., 1977, 435 F.Supp. 501, Judge Orrick explicitly modified his *Ramirez* approach to reject the use of the business invitee standard. In many respects, our approach follows Judge Orrick's thoughtful analysis in *Gallardo.*

630-32, 79 S.Ct. 406, 3 L.Ed.2d 550, supports our selection of a "reasonable care under the circumstances" approach. *Griffith v. Wheeling-Pittsburgh Steel Corp.*, N.D.Pa., 1978, 452 F.Supp. 841, 844. In *Kermarec,* the plaintiff had come on board defendant shipowner's vessel to pay a social visit to a crew member. As he was leaving, the plaintiff injured himself in a fall caused by a defective stairway runner. The plaintiff then sued the shipowner, alleging unseaworthiness and negligence.

Both the Supreme Court and the lower courts began by ruling out any recovery based upon unseaworthiness, just as we must rule out an unseaworthiness recovery under § 905(b). The lower courts then set aside the plaintiff's jury verdict based upon negligence on the ground that the plaintiff had been a mere licensee rather than an invitee. A unanimous Supreme Court reversed. Refusing to incorporate the common law of invitees into admiralty, the Court set forth its own negligence standard:

> the owner of a ship . . . owes to all who are on board for purposes not inimical to his legitimate interests the *duty of exercising reasonable care under the circumstances of each case.* 358 U.S. at 632, 79 S.Ct. at 410. (emphasis added)

The Court saw the common law moving toward " 'imposing . . . a single duty of reasonable care in all circumstances' " 358 U.S. 625, 79 S.Ct. 406, 3 L.Ed.2d 550. It then explained that the real property tort law of invitees had been

> inherited from a culture deeply rooted to the land, a culture which traced many of its standards to a heritage of feudalism, 358 U.S. at 630, 79 S.Ct. at 410.

and that in an effort to adopt that law to do justice in a modern industrialized society,

> common-law courts had found it necessary to . . . create . . . a semantic morass . . . [of] increasingly subtle verbal refinements, . . . subclassifications . . . [and] . . . fine gradations in the standards of care. 358 U.S. at 630-31, 79 S.Ct. at 410.

Invoking the admiralty tradition of "simplicity and practicality," the Court decided to spare the federal courts from having to join in the "confusion and conflict" by simply adopting the better rule towards which the common law was evolving, albeit "unevenly and with hesitation."

The *Kermarec* reasoning applies just as fully today, *Espinoza v. United States Lines, Inc.,* S.D.N.Y., 1978, 444 F.Supp. 405, 413-14, especially in light of the fact that the trend in the law of invitees relied upon in *Kermarec* has continued. *See, e.g., Rowland v. Christian,* 1968, 69 Cal.2d 108, 79 Cal.Rptr. 97, 443 P.2d 561. As Judge Orrick put it in *Gallardo:*

> [this] Court rejects resort to terminology which prevents inquiry into the reasonableness of conduct under the circumstances of a given case. Discussions relating to invitees, contractors, primary and second responsibilities, obviousness of dangers, and relinquishment of control all have the tendency to steer courts away from a balance of the risk of harm against the utility of the particular conduct in question. 435 F.Supp. at 496.

Accord, Griffith v. Wheeling-Pittsburgh Steel Corp., supra, 452 F.Supp. at 844.

Finally, because the legislative history of § 905(b) never refers to the Restatement and never used real property tort

law terms such as "invitee," we feel confident that our adoption of a "reasonable care under the circumstances" approach is not an "impingement upon legislative policy." *Kermarec, supra,* 358 U.S. at 630, fn. 5, 79 S.Ct. 406. *Accord, Gallardo, supra,* 435 F.Supp. at 492, 496; *Espinoza, supra,* 444 F.Supp. at 413-14; *cf. Brown v. Ivarans Rederi, A/S,* 3 Cir., 1976, 545 F.2d 854, 863.

While *Davison v. Pacific Inland Navigation Co., Inc.,* 9 Cir., 1978, 569 F.2d 507, 508-09, fn. 1, left "for another day" the defining of negligence and duty, that case and our earlier decision in *Wescott v. Impresas Armadoras, S. A. Panama,* 9 Cir., 1977, 564 F.2d 875, are both consistent with the standard that we adopt. In each, we held that, under the circumstances, there was no evidence that the shipowner knew or should have known of the dangers involved. It is also possible to read those cases as holding that the negligence of the longshoremen or the stevedore or both was the sole proximate cause of the injury. We cannot conclude as a matter of law that that is so in the case at bar.

In adopting the "reasonable care under the circumstances" standard, we cannot accept the idea that an injured longshoreman cannot recover because he should have demanded that the stevedore halt further loading operations until the stevedore could arrange to improve the working conditions. We agree with those courts which recognize that longshoremen "face trouble for delaying work." *Napoli v.* [*Transpacific Carriers, Etc.*] *Hellenic Lines,* 2 Cir., 1976, 536 F.2d 505, 509; *Davis, supra,* 440 F.Supp. at 452; *Gay v. Ocean Transport & Trading, Ltd.,* 5 Cir., 1977, 546 F.2d 1233, 1241, fn. 17, *reaffirming, Brock v. Coral Drilling, Inc.,* 5 Cir., 1973, 477 F.2d 211, 215.

[5] Under the rule of comparative negligence, the contributory negligence of an injured longshoreman reduces but does not preclude recovery. And in *Dodge v. Mitsui Shintaku Ginko KK Tokyo*, 9 Cir., 1975, 528 F.2d 669, and *Shellman v. United States Lines, Inc.*, 9 Cir., 1975, 528 F.2d 675, we held that "a longshoreman who has received injuries caused by the concurring negligence of his stevedore and the shipowner can recover the full amount of his damages from the shipowner." *Dodge, supra,* 528 F.2d at 673; *Shellman, supra,* 528 F.2d 679-81. Thus, the contributory negligence of the longshoreman's employer or fellow longshoremen will not preclude or diminish recovery through a theory of imputed contributory negligence. It is the longshoreman's own negligence that will reduce his recovery from the negligent vessel under the Amended Act.

IV. *The Standard Applied.*

[6] Having determined the standard of care required of a shipowner subject to an injured longshoreman's third party action under § 905(b), we must reverse the district court's summary judgment dismissing Santos' action. The following district court "findings" decided reasonably disputable factual issues against Santos. We reverse because these issues are material under the negligence standard set forth above, and cannot be decided on a motion for summary judgment.

[7] First, the district court found that the shipowner had not been told about the malfunctioning winch, did not know that it did not work properly, and could not reasonably have been expected to know that the winch was de-

fective. There was evidence, however, that the winch had malfunctioned for two days prior to the day of the accident, that the winch failed to stop properly with almost every load, that the shipowner's representatives had been back and forth in the vicinity of the loading operation during the two days prior to the accident, and that both the winch driver and the hatch tender had complained to superiors whose job it was to communicate problems to the shipowner's representatives in the vicinity of the loading operations. If members of the ship's crew knew, or should have known, about the allegedly defective condition of the winch, their actual or constructive knowledge is imputed to the vessel by respondeat superior. *See, e. g., Davis, supra,* 440 F.Supp. at 450-51; *Gallardo, supra,* 435 F.Supp. at 496.

[8] The standard set forth above recognizes that a shipowner ignorant of an unreasonably dangerous condition may be negligent in not protecting longshoremen against it, if "the exercise of reasonable care would [have] discover[ed] the condition." Within these bounds it is correct to say that the "shipowner [has] a duty to use reasonable care to provide a safe place to work." *Brown v. Ivarans Rederi A/S,* 3 Cir., 1976, 545 F.2d 854, 860, fn. 6(a); House Report at 4707, Senate Report at 10; *Solsvik v. Maremar Compania Naviera, S.A.,* W.D.Wash., 399 F.Supp. 712, 715. *Cf., West v. United States,* 1959, 361 U.S. 118, 123, 80 S.Ct. 189, 4 L.Ed.2d 161; *Migut v. Hyman Michaels Co.,* 6 Cir., 1978, 571 F.2d 352, 356; *Hess v. Upper Mississippi Towing Corp.,* 5 Cir., 1977, 559 F.2d 1030, 1033. By this we do not mean an absolute or non-delegable duty to

provide a safe place. That notion is gone with unseaworthiness. We only mean that under the circumstances of a particular case, failure to repair dangerous equipment or conditions may be negligent.

[9] A "shipowner's duties to the longshoremen . . . [do not] end when it turn[s] the vessel over to the stevedore in a safe condition." *Bess v. Agromar Line*, 4 Cir., 1975, 518 F.2d 738, 741-42, fn. 8. On the trial of this action, it may develop that the malfunctioning of the braking mechanism began only after the stevedore commenced loading operations. In this connection we note that while a less rigorous duty to inspect may apply where full inspection would interfere with the work of the stevedore, the duty to inspect does not automatically cease once stevedores have come aboard for the first time. *Slaughter v. Ronde,* S.D.Ga., 1974, 390 F.Supp. 637, *aff'd per curiam*, 5 Cir., 1975, 509 F.2d 973. *Compare Gallardo, supra,* 435 F.Supp. at 496; *Espinoza, supra,* 444 F.Supp. at 412-13. In Congress' example of the longshoreman slipping on the oily deck, Congress did not limit the phrase

> substance had been on the deck for such a period of time that it should have been discovered and removed by the vessel in the exercise of reasonable care by the vessel under the circumstances

to oil spilled before the first longshoreman came aboard.

Second, the district court found that the stevedore had exclusive control of the gear and the premises during the relevant time period. Under the standard we have adopted, control would be relevant to the extent that it might limit

the shipowner's opportunities to inspect for dangerous conditions or to remedy such conditions. We agree that in some cases, control may play a critical role in determining the appropriate standard of care. Nevertheless, we do not follow those cases which have focused exclusively or primarily on whether the shipowner relinquished control of the stevedoring to the employer of the injured longshoreman. Instead, we focus on the reasonableness of the shipowner's conduct in the light of his practical opportunities to discover defective conditions and remedy them.[7]

Showing that the stevedore or Santos' fellow longshoremen had control to show their concurrent negligence would not be relevant after *Dodge, supra,* and *Shellman, supra,* unless that control could fairly be said to help prove a sole or superseding cause.

While the admitted facts portion of the pretrial order states that the stevedore was in "control of the loading," that stipulation would not require a jury to conclude that the stevedore had exclusive control of the gear and prem-

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[7]Cases focusing on relinquishment of control include *Cox v. Flota Mercante Grancolombiana, S.A.*, 2 Cir., 1978, 577 F.2d 798; *Briley v. Charente S.S. Co., Ltd.*, 5 Cir., 1978, 572 F.2d 498, 500; *Hickman v. Jugoslavenska Linijska, Etc.*, 2 Cir., 1978, 570 F.2d 449, 451-52; *Hurst v. Triad Shipping Co.*, 3 Cir., 1977, 554 F.2d 1237, 1249-253; *Munoz v. Flota Merchante Grancolombiana, S.A.*, 2 Cir., 1977, 553 F.2d 837, 840-41. *See also, Restatement (Second) of Torts,* §§ 409, 414 (1965); *Talliercio v. A/S D/S Svenborg & D/S of 1912 A/S,* S.D.N.Y., 1978, 451 F.Supp. 949, 951-52; *Lemon v. Bank Lines, Ltd.,* S.D.Ga., 1978, 449 F.Supp. 1016, 1020-021; *Valle v. Jugoslavenska Linejska Provibda,* S.D.N.Y., 1977, 434 F.Supp. 608, 611-12; *Croshaw v. Koninklijke Nedlloyd, B.V. Rijswijk,* D.Ore., 1975, 398 F.Supp. 1224, 1229-231. *Cf. Chavis v. Finnlines, Ltd.,* O/Y, 4. Cir., 1978, 576 F.2d 1072, 1079-080, *quoting Riddle v. Exxon Transportation Company,* 4 Cir., 1977, 563 F.2d 1103, 1111-112; *Teofilovich v. d'Amico Mediterranean Pacific Lines,* C.D.Cal., 1976, 415 F.Supp. 732,739.

ises. From the record before us, it is not at all clear that the shipowner did not maintain ultimate control over the ship and its gear during the loading. Far from concluding that *only* the stevedore could have had the defective winch repaired, we cannot be certain from the record that the stevedore had *any* authority to repair it.

Third, the district court held that the initial spillage was "caused by the pallet striking the pallet jack." Santos argued the broader view that the defective braking mechanism caused the initial spillage by failing to stop the pallet before it struck the pallet jack. Since the winch driver's deposition testimony supports this broader view, the importance of the braking mechanism as a "cause" of the initial spillage should have been left for the jury.

Fourth, the district court emphasized that after the longshoremen raised the partially spilled pallet they left it to swing back and forth overhead. The amount of swinging, if any, matters a great deal because Santos claims that the remaining sacks of wheat did not loosen because the pallet swung back and forth but because the winch's defective braking mechanism let the pallet keep creeping down, thus requiring the winch driver to keep jerking the pallet back up to the desired height. Since some of the deposition testimony suggested little if any swinging, the amount of swinging as compared with the amount of vertical movement caused by the allegedly defective winch should have been left for the jury.

Finally, the district court applied Restatement (Second) § 343 and § 343A which, as we have seen, incorporate the substance of the defenses of contributory negligence and

assumption of risk. In applying those sections, the court concluded that the "jumpiness" of the winch was open and obvious, and that both because the plaintiff's activities were dangerous, and because the plaintiff recognized some of the dangers, he could not recover as a matter of law. These findings also require reversal. They demonstrate that the district court actually relied upon the limiting provisos, §§ 343(b) and 343A, in deciding to grant summary judgment. Thus, its mistaken view of the law cannot be said to have been harmless error.[8]

As an alternate ground of decision, the district court concluded that the "defective condition of the winch had only a remote cause-in-fact relationship to plaintiff's accident and could not have been the proximate cause thereof as a matter of law." Because the district court based this conclusion in part on factual findings which we have just indicated should have been left for trial, we cannot sustain the district court's dismissal on this alternate ground. We thus do not consider whether, if we had sustained the factual findings, we would have agreed that the defective condition could not have been found a proximate cause of the accident as a matter of law.

The judgment is reversed and the case is remanded for further proceedings consistent with this opinion.

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[8]We note that the standard we adopt today is very similar to the standard set forth in Restatement (Second) of Torts § 343 and § 343A, minus the limitations placed on recovery under those provisions by § 343(b) and § 343A(1). Had the district court not relied on the limiting provisions of the Restatement invitee rule, the error of law may have been harmless. However, as we have noted, the district court did rely on the limiting provisos.

Appendix C

United States Court of Appeals
For the Ninth Circuit

Lauro de los Santos, Appellant, vs. Scindia Steam Navigation Co., Ltd., Appellee, Seattle Stevedore Co., Intervenor.	No. 76-3225 OPINION

[June 28, 1979]

On Petition for Rehearing

Before: DUNIWAY and CHOY, Circuit Judges,
and Grant,* District Judge

Per Curiam:

In its petition for a rehearing and suggestion of a rehearing in banc, appellee Scindia calls our attention to the fact that *Anderson v. Iceland Steamship Co.*, D. Mass., 1977, 431 F. Supp. 869, was reversed by the First Circuit, 1978, 585 F.2d 1142. However, the First Circuit expressly declined to adopt Restatement (Second) of Torts, §§ 343 and 343A as the standard of care, because the injury occurred on the dock, not on the ship. The court looked to § 414A of the

*The Honorable Robert A. Grant, Senior United States District Judge for the Northern District of Indiana, sitting by designation.

Restatement, which deals with a landowner's liability for activities dangerous to those outside the land. In commenting on Restatement §§ 343 and 343A the court said that they incorporate "the defenses of contributory negligence and assumption of risk." (p. 1147) That is precisely the reason why we do not adopt them as the appropriate standard in this case.

In our opinion, we said that the Second, Fourth and Fifth Circuits "have defined 'negligence' in terms of a landlord's duty to invitees under Restatement (Second) of Torts, § 343 and § 343A." Scindia says that we should add the First, Third, Seventh and probably the Sixth Circuits to the list. Scindia is right about the Seventh, *Clemons v. Mitsui O.S.K. Lines, Ltd.*, 7 Cir., 1979, ... F.2d ..... (No. 78-1812, April 16, 1979). Scindia is wrong about the others.

As to the First Circuit, it cites *Anderson v. Iceland Steamship Co., supra,* which expressly does not adopt §§ 343 and 343A. As to the Third, Scindia cites *Marant v. Farrell Lines, Inc.*, 3 Cir., 1977, 550 F.2d 142, and *Hurst v. Triad Shipping Co.*, 3 Cir., 1977, 554 F.2d 1237. Neither case is in point. *Marant* does not mention §§ 343 and 343A at all. *Hurst* expressly declines to rely on §§ 343 and 343A. See fn. 35, 554 F.2d at 1248. It uses §§ 409-29, which deal with an employer's duty to control the activities of an independent contractor. As to the Sixth, Scindia cites *Migut v. Hyman-Michaels Co.*, 6 Cir., 1978, 571 F.2d 352, 356. It is obviously not in point. There, the shipowner's liability to the longshoreman had been settled, and the

question was whether the shipowner or the charterer should bear the cost. The opinion in the case does not mention §§ 343 and 343A.

The petition for a rehearing is denied.

The suggestion of a rehearing in banc has been transmitted to the judges who are in regular active service, and no judge in regular active service, or judge who was a member of the panel, has requested a vote on the suggestion.

The suggestion of a rehearing in banc is rejected.